

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs April 24, 2009

**MONTE SUE SMITH v. JOE NEIL SMITH**

**Appeal from the Chancery Court for Dickson County**  
**No. 10067-06     George C. Sexton, Judge**

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**No. M2008-00732-COA-R3-CV - Filed August 27, 2009**

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In this divorce case, Monte Sue Smith (“Wife”) sued Joe Neil Smith (“Husband”) for divorce after nearly 30 years of marriage. Following a bench trial, the court divorced the parties on stipulated grounds, classified and distributed the marital property, and awarded Wife rehabilitative alimony. Husband’s appeal relates to the classification and division of the marital estate. He concludes that the trial court erred (1) by ruling that Husband’s workers’ compensation award was marital property; (2) by awarding Wife one-half of a jointly-held investment account; (3) by including Husband’s IRA in the marital estate after it was cashed out to pay certain marital bills; and (4) by failing to credit Husband with the payment of marital debts since the special master’s hearing. Concluding that there is no error, we affirm the judgment in all respects.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court**  
**Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and JOHN W. MCCLARTY, JJ., joined.

Lindsay C. Barrett, Dickson, Tennessee, for the appellant, Joe Neil Smith.

No appearance by or on behalf of the appellee, Monte Sue Smith.

**OPINION**

I.

Wife filed for divorce in February 2006. At the time of the trial, Wife was 47 and Husband was 49. The parties’ only child was an adult.

Wife dropped out of school in the 11th grade to get married, but later obtained her GED. For over 20 years, Husband had worked for Concrete Form Erectors, a construction company that performed heavy-duty construction for large-scale commercial projects. At the time of the trial, Husband was a foreman. Throughout the marriage, Husband was the breadwinner and Wife was primarily a homemaker and stay-at-home mom, but she had taken some odd jobs to earn extra spending money. She had also been a substitute teacher and sold Avon products from home. Wife said she was “the best mom and wife” and Husband agreed that he “couldn’t have asked for anything better.”

Wife was prescribed medication for depression by her psychiatrist. Husband agreed that Wife had developed some emotional problems, but he was against her taking medication to deal with them. Since their separation, Wife had two surgeries, one to her hand and another to repair a rotator cuff. She was insured through Husband’s employer. Wife had also undergone a procedure to remove some “precancerous” cells from her uterus. Unfortunately, the surgery was not successful. She had another procedure scheduled for the week after the trial to try to resolve the problem. In 2000, Husband suffered a crushed heel and a crushed elbow in a work-related accident. Wife cared for Husband as he recovered from the injuries and was confined to a wheelchair for several weeks. In 2002, Husband received a total settlement of \$45,000 for the resulting permanent impairments to his right foot and left upper extremity. Since the settlement, Husband had not missed work or lost wages as a result of his injuries. Unrelated to his work accident, Husband suffered from chronic pain and arthritis following his two hip surgeries for which he took multiple medications. He said he continued to hold his job, but did “very little” at work. He anticipated finding an “easier” line of work in the next five years because standing, walking to some degree, and lifting had become problematic.

After Wife left the marital home in January 2006, she lived with her mother before renting her own apartment. Her rent was \$599 a month including utilities. During the separation, she had started to go out socially, but lived alone and received no financial assistance from anyone except for the temporary support of \$200 a week that Husband paid. Wife began working at O’Charley’s restaurant as a server within a month of separating from Husband. By the time of the February 2007 trial, she had become a hostess and then a coordinator. She earned \$9.75 an hour, for a monthly income of about \$1,200. Wife’s income and expense statement reflects that she is \$703 short of funds to pay her expenses each month. Pursuant to an earlier court order, Wife was awarded a 2004 Colorado truck the parties bought during the marriage and became responsible for the monthly payments and insurance. After her surgeries, Wife had gotten behind in her bills and had cashed out her Farm Bureau IRA to become current, but had repaid the money before incurring a penalty. In addition, Wife had broken a tooth while eating, necessitating emergency dental work that cost nearly \$4,000, for which she had taken out two loans that she could not repay.

Wife knew little about financial matters, which she attributed to being married since the age of seventeen and never before living on her own. Wife had not pursued other employment pending the divorce because she did not feel that she could get a job paying as much as she earned at

O'Charley's. Wife agreed that Husband had paid the marital debts during the separation as well as her temporary support, while she had begun paying her truck payment and her cell phone bill.

According to the income and expense statement filed by Husband, his gross monthly income was \$5,786, for a net monthly income of \$4,477. In 2006, Husband earned just under \$60,000 including overtime payments. In addition, he received a \$9,000 year-end bonus. He used part of the bonus money to make a down payment on a 2007 truck he bought and another \$3,000 to hire a private investigator to follow Wife during the separation. Husband said he had to borrow \$10,000 from his sister in order to pay all the bills and temporary alimony during the separation. His monthly expenses, which he listed at \$4,738, excluding the temporary support payments, included \$500 a month to repay his sister although he had not begun repaying her as of the time of the trial. In addition, Husband listed a future mortgage payment of \$850 per month, the amount he estimated he would pay if he took out a loan to purchase Wife's interest in the marital home.

In 2002, Husband opened an Edward Jones investment account in his and Wife's names with \$20,000 from the workers' compensation settlement award he received. Wife acknowledged that she was aware of the joint account, and that Husband managed it. According to Husband, he put Wife's name on the Edward Jones account so that Wife and their daughter could access the funds in the event something happened to him. Asked whether it was agreed between he and Wife that Wife would have no control over the account, Husband said "more or less." Of the remaining settlement money, Husband spent \$10,000 on home improvements and deposited \$4,000 in both his and Wife's IRAs. He believed the remaining \$7,000 was spent toward "marital bills."

Husband also had an IRA with an \$11,865 balance that was funded completely by his employer. During the separation, he cashed out the account and used \$5,000 to pay his attorney's fees and another \$2,000 to cover outstanding checks Wife cashed when she left. Husband could not account for the remaining \$4,000, but was certain it was spent "for marital bills." Husband incurred a tax liability of \$6,600 as a result of penalties resulting from the early withdrawal of his IRA funds and because his tax status had changed to "married filing separately."

At the conclusion of the trial, the court adopted the special master's findings and proposed division of assets, made each party responsible for their debts incurred during the separation, and awarded Wife continued rehabilitative alimony through February 2009, for a total of three years. Husband timely appealed.

## II.

Our review of the trial court's findings of fact is de novo upon the record of the proceedings below, accompanied by a presumption of correctness, a presumption we must honor unless the preponderance of the evidence is against those findings. Tenn. R. App. P. 13(d); *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). There is no presumption of correctness as to the trial court's conclusions of law.

*Kendrick v. Shoemake*, 90 S.W.3d 566, 569 (Tenn. 2002); *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996).

A trial court has broad discretion in fashioning a division of marital property. *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn. 1983); *Barnhill v. Barnhill*, 826 S.W.2d 443, 449-50 (Tenn. Ct. App. 1991). In evaluating whether a trial court has abused its discretion, we are bound by the principle that the trial court “will be upheld so long as reasonable minds can disagree as to propriety of the decision made.” *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000) and *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000)).

### III.

Husband presents the following issues for our review:

1. Whether the trial court erred in ruling that Husband’s workers’ compensation award was marital property.
2. Whether the trial court erred in its division of the marital estate by
  - (a) awarding Wife one-half of the Edward Jones investment account;
  - (b) including in the marital estate Husband’s IRA, which had been cashed out by Husband and used in part to pay for marital bills, and
  - (c) by failing to include amounts Husband paid toward marital debt since the special master’s hearing.

### IV.

Husband challenges the trial court’s treatment of his workers’ compensation settlement as marital property. In particular, he contends that the Edward Jones investment account, undisputedly funded entirely by a portion of Husband’s workers’ compensation settlement award, was his separate property because, as he understood it, the award was payment for future lost wages.<sup>1</sup> As noted, in 2002, Husband received a total settlement of over \$44,000 for work-related injuries he sustained two years earlier. After paying for various home improvements and funding his and Wife’s retirement IRAs, Husband opened an Edward Jones joint account in his and Wife’s names and deposited \$20,000 of the settlement funds into that account. By the time of the trial, the account had more than doubled in value to \$40,866.

Husband points out that the special master, while finding that the settlement award was marital property, made a specific finding that Husband “was compensated for future loss of earnings.” Husband takes issue with the trial court’s finding that the award “was not for future loss

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<sup>1</sup>“Separate property” is statutorily defined to include awards for “future medical expenses, and future lost wages.” Tenn. Code Ann. § 36-4-121(b)(2)(E).

of income.” We observe that while the trial court and the special master disagreed on this issue, they did agree that the Edward Jones account was properly classified as marital property. As to the conflict in the findings, we hold that it is to be evaluated under a preponderance of the evidence standard since obviously there was no concurrent finding. “When the findings of the Special Master and the trial court are not concurrent, the standard of review of a trial court’s findings of fact is de novo, and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise.” *Ladd v. Marks*, 247 S.W.3d 628, 637 (Tenn. Ct. App. 2007) (citing Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001)). However, this dispute between the special master and the trial court is not critical. We say this because we agree with the trial court that the real issue on this subject is whether the settlement, regardless of its source, or the motivation for its payment, was transmuted into marital property by the conduct of the parties.

Transmutation takes place when the parties treat separate property in such a way as to reflect an intention that it become marital property. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn. 2002); *Batson*, 769 S.W.2d at 858. Stated otherwise, “separate property may become part of the marital estate if its owner treats it as if it were marital property.” *McClellan v. McClellan*, 873 S.W.2d 350, 351 (Tenn. App. 1993); *Barnhill v. Barnhill*, 826 S.W.2d 443, 452 (Tenn. App. 1991). The doctrine is based on the rationale “that dealing with property in these ways creates a rebuttable presumption that the property was gifted to the marital estate.” *Langschmidt*, 81 S.W.3d at 747; *Eldridge v. Eldridge*, 137 S.W.3d 1, 13 (Tenn. Ct. App. 2002). The presumption arises, for instance, by “[s]imply placing the title to a piece of separate property in the names of both parties. . . .” *Langschmidt*, 81 S.W.3d at 747; *Wright-Miller v. Miller*, 984 S.W.2d 936, 941 (Tenn. Ct. App. 1998). The presumption can be rebutted, however, with evidence that a party took great care to maintain the funds as separate property. Such evidence may include “circumstances or communications clearly indicating an intent that the property remain separate.” *Batson*, 769 S.W.2d at 858 (citing 2 H. Clark, *The Law of Domestic Relations in the United States* § 16.2, at 185 (1987)).

This brings us to the second prong of Husband’s argument, namely, that if a presumption of transmutation of the workers’ compensation award was raised by virtue of his having deposited some of the settlement award into a jointly held investment account, that presumption was effectively rebutted by the proof presented at the trial. Upon our considered review of the record, we must disagree. Again, beginning with the settlement award in its entirety, the proof showed that Husband received the settlement check in June 2002. In October 2002, Husband opened the joint Edward Jones account at issue with a \$20,000 deposit, then spent the remainder of the award on home improvements and contributions to the parties’ retirement accounts. Husband strenuously urges that he intended the money in the Jones account to be replacement income in the future. The evidence on this point, however, was limited to the following testimony Husband gave at two points during the trial:

Q: In any event, during the time that that Edward Jones [account] was set up, what was your belief and your understanding about that account, as far as what were your intentions about that account.

A: Well, it was for the point in time that I was unable to work anymore, which I have told her before she left that I didn't know how much longer that I was gonna be able to work in the way I was working now.

On further questioning, Husband testified:

Q: Why is [Wife's] name on the account?

A: Well, for the fact of which when I got to the point in time that I couldn't do anything or actually something happened to me, her and my daughter would be able to have access to it without a lot of legal problems.

Q: Okay. And who has been the person that has controlled that account; managed it/controlled it?

A: Well, more or less, me. But I've just put it in and left it alone.

Q: Well, has [Wife] had anything to do with the account as far as –

A: No, sir.

Q: – any kind of control or management of the account?

A: No, sir.

Q: And has it always been understood and agreed between the two of you that that's the way it's going to be?

A: More or less.

For her part, Wife conceded that Husband had set up and managed the account with no involvement from her. She said she was aware, however, that she was authorized to act on the account and received quarterly statements addressed to her. Given the paucity of evidence on this matter, there is simply nothing to support Husband's position that he certainly intended to keep any portion of his workers' compensation award as his separate property. The presumption that the award, and the Edward Jones account in particular, was a marital asset was not defeated in this case. The preponderance of the evidence supports the trial court's finding that the Edward Jones account is marital property.

V.

Husband next challenges the division of the marital estate as inequitable with respect to the trial court's disposition of three specific assets or debts – the Edward Jones investment account, Husband's Edward Jones IRA, and marital debts paid by Husband since the special master's hearing.

As noted, the trial court adopted the special master's findings and proposed equitable division of the marital estate. In its final decree, the trial court set forth the division of assets and debts as follows:

[Husband] is awarded the marital real property . . . valued at \$112,000. [Wife] shall execute a quitclaim deed conveying her interest in said property to [Husband]. [Husband] shall pay to the Wife the sum of \$56,000 for her interest in the marital residence. . . .

[Husband] is further awarded all right, title and interest in the three (3) acres . . . inherited by [Husband], his brothers and sisters from their aunt.

[Wife] is awarded all items of personal property, household goods, furniture, furnishings and appliances in her possession including the 2004 Chevrolet Colorado truck, but excluding the separate property of [Husband]. . . .

[Husband] shall be awarded all equipment, tools, household furnishings, furniture and appliances in his possession including the 2007 Toyota truck. . . .

[T]he Edward Jones account . . . shall be equally divided between the parties.

[Wife] is hereby awarded all monies contained within her IRA at Farm Bureau, which she previously cashed out. She shall be solely responsible for payment of any tax liability arising from the cashing out of her IRA and shall indemnify and hold harmless [Husband] from said liability. She is further awarded the Hartford Life & Accident policy insuring her life.

[Husband] is hereby awarded all monies from the Edward Jones account . . . , cashed out by him in 2006. He shall be solely responsible for the payment of any tax liability. He is further

awarded his ROTH IRA and regular IRA with Farm Bureau and the AXA Equitable policy.

[Husband] is awarded all monies within the joint bank accounts at U.S. Bank and First Federal.

[Husband] shall be responsible for payment of the debt owing to Sears in the amount of \$742.00, and to Edward Jones bank credit in the amount \$4,857.00 and he shall indemnify and hold harmless [Wife] for such payment.

[Wife] shall assume and be solely responsible for any debts she may have incurred in her respective name. . . .

[Husband] shall assume and be solely responsible for any debts he may have incurred in his respective name . . . .

[Husband] shall pay to [Wife] the sum of seven thousand nine hundred ninety one dollars (\$7,991.00) as an adjustment and equalization of property division.

Briefly summarized, the total marital assets were valued at \$211, 266 and the total marital debts at \$5,599, for a total net marital estate of \$205, 667. In the division of the estate, Husband was awarded assets valued at a total of \$109, 623, while Wife was awarded assets valued at \$101, 643. After accounting for the marital debts assigned to Husband, the estate was divided equally, with \$101, 643 awarded to each party.



After classifying the property of a divorcing couple, the trial court is charged with equitably dividing the marital property. “Dividing a marital estate is not a mechanical process but rather is guided by considering the factors in Tenn Code Ann. § 36-4-121(c).<sup>2</sup>” *Manis v. Manis*, 49 S.W.3d 295, 306 (Tenn. Ct. App. 2001). “Trial judges have wide latitude in fashioning an equitable division of marital property, and appellate courts accord great weight to a trial judge’s division of marital property. Thus, we will ordinarily defer to the trial judge’s decision unless it is inconsistent with the factors in Tenn Code Ann. § 36-4-121(c) or is not supported by a preponderance of the evidence.”

*Id.*

We return to the Edward Jones investment account which, as noted, was found to be marital property and divided equally, so that Husband and Wife each received \$20,433. Husband argues, as an alternative to his previous argument, that the trial court should have awarded the entire balance of the account to him even if the account was marital property. In support of his position, Husband concedes that the marriage was of significant duration, but emphasizes that this is only one factor to be considered. He submits that a consideration of other factors, including Wife’s earning capacity,

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<sup>2</sup>The relevant factors include the following:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (6) The value of the separate property of each party;
- (7) The estate of each party at the time of the marriage;
- (8) The economic circumstances of each party at the time the division of property is to become effective;
- (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) The amount of social security benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

which Husband contends is greater than her testimony indicated, his physical health, and his sole responsibility for funding and maintaining the account, must be weighed in favor of awarding the account to him alone. We disagree.

Wife was primarily a homemaker from the time she married Husband at 17 until they separated nearly 30 years later. Promptly after departing the marriage, she found a job and had advanced her position so that she was earning above minimum wage by the time of the trial. While Wife had held occasional jobs during the marriage, there was no evidence that she had a much greater earning potential that she refused to tap into. As to Husband's health, the proof showed that, following his hip surgeries, he was able to continue working in his same job but would be monitored on a yearly basis as to the need for further hip replacement surgery.

Next, we consider the Edward Jones IRA that Husband cashed out and closed during the separation. Although noting that the money was spent during the separation, the special master classified the \$11,865 that Husband took from the account as marital property and awarded it to Husband. The gist of Husband's argument regarding this asset is that he was not credited with spending some of the funds he withdrew from his IRA on "marital debts," nor did the trial court consider the tax penalty he incurred as a result of the withdrawal. First, the proof did not establish how much of the funds actually went toward marital debts. Husband testified that he used \$5,000 to pay his attorney's fee in this case and another \$2,000 was deposited to cover money that Wife withdrew from a joint checking account when the parties separated. Husband could not account for the remainder of the funds.

Lastly, Husband asserts that the trial court erred in failing to credit him for \$13,857 he asserts he paid toward marital debts between the time of the special master's hearing in February 2007 and the trial in November 2007. Husband's itemized list reflects that he made payments on the IRS debt related to the IRA withdrawal, credit card bills, a gas card, and a home equity loan. In addition, he paid off the balance owed on the riding lawn mower awarded to him and the property taxes on the marital home which he retained after paying Wife's equity to her. The trial court expressly denied Husband's "request for additional credit for payments made to joint debts on a temporary basis. . . ."

Husband concludes that the division of these assets, viewed one at a time, rendered the division of the marital estate inequitable as a whole. We disagree. It is evident that the trial court's goal was to achieve, as far as possible, an equal division of the marital estate. "A division is not rendered inequitable simply because it is not precisely equal, or because each party did not receive a share of every piece of marital property." *Kinard v. Kinard*, 986 S.W.2d 220, 230 (Tenn. Ct. App. 1998). Our consideration of the overall property division, guided by a consideration of the facts of this case in light of the relevant statutory factors, leads us to conclude that the trial court achieved its goal.

VI.

The judgment of the trial court is affirmed. This case is remanded to the trial court, pursuant to applicable law, for enforcement of its judgment and for collection of costs assessed below. Costs on appeal are taxed against the appellant, Joe Neil Smith.

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CHARLES D. SUSANO, JR., JUDGE